

Pham (Migration) [2024] ARTA 107 (14 November 2024)

Decision and

Reasons for Decision

Applicant:	Ms Thi Thanh Ngon Pham
Visa Applicants:	Mr Ngoc Hai Ha Miss Do Quynh Nhu Ha
Respondent:	Minister for Home Affairs
Tribunal Number:	1923572
Tribunal:	General Member D. Barker
Place:	Sydney
Date:	14 November 2024
Decision:	The Tribunal sets aside the decision under review and remits the applications for a Partner (Provisional) (Class UF) visa for reconsideration, in accordance with the order that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl 309.211 of Schedule 2 to the Regulations • cl 309.221 of Schedule 2 to the Regulations

Statement made on 14 November 2024 at 4:51pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – joint social activities and frequent travel – money transfers – long term relationship – evidence of electronic communication – decision under review remitted

LEGISLATION

Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024
Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

Statement of reasons

APPLICATION FOR REVIEW

1. From 14 October 2024, the Administrative Appeals Tribunal (AAT) became the Administrative Review Tribunal (the Tribunal). Under the transitional provisions in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (the Transitional Act), applications for review to the AAT that were not finalised before 14 October 2024 are taken to be an application for review to the Tribunal. The Transitional Act gives the Tribunal the authority to continue and finalise any aspect of the review not already completed by the AAT. This decision and statement of reasons is made by the Tribunal.
2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 20 August 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) Subclass 309 visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The first named visa applicant (hereafter referred to as the applicant) applied for the visa on 1 August 2018 on the basis of their relationship with the review applicant (. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need to satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211 and cl 309.221 because they were not satisfied on the evidence that the parties were in a genuine and continuing spousal relationship.
5. The review applicant (hereafter referred to as their sponsor) appeared before the Tribunal on 24 October 2024 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The sponsor was represented in relation to the review. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the decision under review is set aside and the matter should be remitted for reconsideration.

8. BACKGROUND

9. The applicant is a national of Vietnam and is 42 years of age. He has a son, born January 2010 and a daughter from his previous marriage to Thi Thanh Mai Do. His daughter, Do Quynh Nhu Ha, born in March 2005, is included in this application. His marriage to Thi Thanh Mai Do lasted from 2005 to January 2012 and ended by divorce.
10. The sponsor was born in Vietnam and is also 42 years old. The sponsor first came to Australia in November 2005 on a Partner visa and is an Australian citizen by grant in April 2009. The sponsor was first married to Quoc Hung Vu from May 2004 to November 2010 and ended by divorce. The sponsor has two sons, aged 11 and 13 years respectively, from a further undisclosed relationship.

11. The parties claim to have met in Canley Heights, NSW on 20 April 2017 and to have subsequently made a commitment to a shared life together to the exclusion of all others on the date of their marriage in Canley Heights, NSW, on 5 January 2018.
12. The parties provided documents to the Department in support of the current application including but not limited to:
 - Evidence as to the parties' identity and marital status;
 - Witness support statements x 2.
13. The delegate's decision record, a copy of which was provided to the Tribunal with the review application states that the delegate was not satisfied evidence regarding the different aspects of the parties' relationship demonstrated they were in a genuine spousal relationship. In particular the delegate noted the following:
 - the parties provided no evidence in relation to the financial aspects of their relationship;
 - the parties provided no evidence in relation to the nature of their household arrangements;
 - In relation to the social aspects of the parties' relationship, the delegate accepted that the parties submitted evidence of travel together including boarding passes and flight tickets, and as well a selection of photographs taken with friends and family and on different occasions. The delegate accepted that this evidence indicates that the parties have undertaken some joint social activities whilst in the company of each other's friends and families, including at their wedding ceremony and reception at a restaurant. The delegate noted that that these events were attended by members of both families. The delegate however expressed concern that no traditional wedding ceremony was held and considered explanations for this provided by the parties to be unpersuasive.
 - In relation to the commitment aspect of the parties' relationship, the delegate considered the parties explanation for the rapid inception and development of their relationship to be unpersuasive and that when interviewed the applicant displayed a lack of awareness of certain aspects of the sponsor's circumstances, including: the street address of the sponsor in Australia where it was claimed the parties stayed together; the sponsor's relationship history and her social network.
 - There was also an allegation received by DHA that the sponsor entered into a contrived relationship with the applicant for which the sponsor was paid money.
 - information provided by the applicant when interviewed regarding the inception and development of the parties' relationship contradicted information provided in the applicant's and sponsors relationship statements. Limited information was provided as to when the parties' relationship commenced and how it developed to reach a decision to commit to marriage.
14. Prior to the hearing the Tribunal received further documentary evidence including, but not limited to:
 - Copy of DHA delegate decision record;
 - Representative submission dated 19 September 2024,

- Sponsor statutory declaration, declared 20 September 2024;
- Applicant relationship statement dated 9 September 2024;
- Photographs;
- Chatlogs and other evidence of electronic communication;
- Financial remittance receipts;
- Witness support statements x 12.

15. **CONSIDERATION OF CLAIMS AND EVIDENCE**

16. The issue in the present case is whether the applicant and sponsor were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
17. In the particular circumstances of this matter, concerns have been raised that the parties may be in a contrived relationship for the purpose of facilitating the applicant's migration to Australia on a pathway which could lead to permanent residency in Australia. This calls into question as to whether the applicant and sponsor are reliable sources of information in relation to the circumstances of their relationship. Due to the nature of this sort of review the majority of oral evidence provided to the Tribunal at hearing came from the sponsor, who the Tribunal found to be a credible witness. Factors influencing the Tribunal assessment in relation to this factor include the spontaneous way in which the sponsor gave her oral evidence, frequently elaborating on issues of relevance without prompting from the Tribunal. The Tribunal has also formed the view that there is a general level of consistency between the oral evidence provided at hearing and the documentary evidence provided to the Tribunal in support of the review application. The Tribunal would also note that there is considerably more evidence before the Tribunal than was available to the DHA delegate from what is apparent from the material in the DHA file sent to the Tribunal in association with this review.

Whether the parties are in a spouse or de facto relationship

18. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.
19. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal's decision: cl 309.221. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
20. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in

reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

21. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
22. The Departmental file contains a copy of a marriage certificate, which indicates the parties were married in Canley Heights, NSW on 5 January 2018. Also in the Departmental file are copies of a Divorce Order regarding the sponsor's divorce from her previous spouse, dated 5 October 2010 and a copy, with translation, of a Divorce Order regarding the applicant's divorce from his previous spouse, dated 6 October 2011. The Tribunal has no reason to doubt the authenticity of these documents.
23. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

24. The Tribunal has considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
25. In considering the financial aspects of the parties' relationship, the Tribunal recognises that the parties have resided in different countries and that this can influence the extent to which they have combined their finances.
26. *Joint ownership of real estate or other major assets*
27. The evidence does not demonstrate that the parties own any property together. This was acknowledged in the sponsor's evidence at hearing. There is no evidence of other jointly owned assets of any significance.
28. *Joint liabilities*
29. The evidence does not demonstrate that the parties have shared liabilities. This was acknowledged in the sponsor's evidence at hearing.
30. *The extent of any pooling of financial resources, especially in relation to major financial commitments*
31. The parties gave consistent evidence at hearing that they do not pool financial resources to any significant extent, as they are both on modest incomes and are essentially self sufficient financially in their respective countries.
32. Both the applicant and sponsor displayed a general awareness of their spouses financial circumstances, with these being that the applicant has two jobs, a day time job in the construction sector and an evening/night time job as a hotel manager. The sponsor is currently in receipt of income support payments from Centrelink and previously worked as a waitress in a restaurant in Cabramatta.

33. In relation to financial remittance receipts showing funds sent to each other by the parties, the sponsor explained that the applicant usually assists her to pay for costs associated with her travel to Vietnam to spend time with him and that sometimes he borrows money from friends to send to her for this purpose. The sponsor explained that she in turn remits some money back to him after those occasions to assist the repayment of these personal loans.
34. *Whether one person in the relationship owes any legal obligation in respect of the other*
35. There is no indication and there is no claim that the parties have any legal obligation with respect to each other.
36. *The basis of any sharing of day-to-day household expenses*
37. As noted above, the parties gave consistent evidence that they are essentially self-reliant in relation to meeting their day-to-day household expenses.
38. *Overall assessment of the financial aspects of the parties' relationship*
39. Whilst the delegate highlighted concerns from a lack of documentary evidence regarding the financial aspects of the parties relationship, the Tribunal has the benefit of some finance remittance receipts showing funds remitted between the parties. The Tribunal's assessment is that the remittance receipts filed with the Tribunal give some support to the contention that the parties have modest incomes and do share some costs associated with the sponsor's travel to Vietnam since the parties marriage in 2018.
40. The Tribunal considers the financial aspects of the parties' relationship to be not unusual for a couple in their particular circumstances, who reside in different countries and with their being of a mature age. The Tribunal has perceived nothing particularly untoward about the financial evidence provided in association with the review application and considers the financial aspects of the relationship to provide some, but not a great deal of support to a contention the parties are in a genuine spousal relationship.
41. ***The nature of the household***
42. The Tribunal has considered the nature of the household – including any joint responsibility for care and support of children; the parties' living arrangements; and any sharing of housework. In considering the nature of the parties' household, the Tribunal recognises that the parties have resided in different countries and that this can influence the nature of their household arrangements.
43. *Joint responsibility for the care and support of children*
44. There is no child from the parties' relationship. There is no claim and no evidence which would support a contention the sponsor has joint responsibility for care and support of the second named visa applicant.
45. *The living arrangements of the parties*
46. The sponsor resides in rental accommodation with her two children in Canley Heights, NSW. This is a granny flat attached to the landlord's house and the applicant indicated that the plan is that they will rent a larger apartment if the visa applications are successful and the applicant and his daughter are able to join the sponsor in Australia.

47. The applicant resides with the second named visa applicant, his daughter in his parent's family home in Ho Chi Minh City, Vietnam.
48. The parties make no claim to have established a shared household together at any stage, although they claim that they stay together during the trips the sponsor has made to Vietnam since the parties' marriage in January 2018. Whilst they do not stay together in the family home of the applicant on those occasions, the Tribunal is satisfied that the parties have provided a plausible explanation for this, being that so that they can have privacy in their time together, when in Ho Chi Minh City and not travelling together elsewhere in Vietnam or third countries, they stay at the hotel where the applicant works as a night manager.
49. *Sharing of the responsibility for housework*
50. This particular aspect is not in the view of the Tribunal indicative of the nature of the parties' relationship. They live in different countries and have not established a shared household together. The Tribunal has given no weight to this factor
51. *Overall assessment of the nature of the parties' household arrangements*
52. Whilst the Tribunal perceives nothing implausible or untoward about the parties' contentions with respect to their current and anticipated future household arrangements, given they reside in separate countries, and have no shared responsibility for the care and support of children, the Tribunal does not consider it appropriate to attribute either positive or negative weight to this aspect of their relationship.
53. ***The social aspects of the relationship***
54. The Tribunal has considered the social aspects of the relationship – including whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
55. *Whether the persons represent themselves to other people as being in a married relationship with each other*
56. The Tribunal notes the marriage certificate is an indicator the parties have represented themselves to the Australian authorities as a couple.
57. *The opinion of the parties' friends and acquaintances about the nature of the relationship*
58. The Tribunal has reviewed the witness support declarations provided in association with the visa and review application. These encompass declarations made by members of both the applicant and sponsor's families. The delegate considered it appropriate to accord some weight to the two witness support declarations available at the time of application. The Tribunal shares this view and further to this has given weight to the opinions provided in the witness support statements provided in association with the review application. The Tribunal considers this witness support to be of relevance to the circumstances of the parties' relationship at the time of decision and notes there is consistency in the witness opinions that the parties are in a genuine and continuing relationship. Accordingly the Tribunal has given positive weight to this evidence.
59. The Tribunal has reviewed photographs provided in association with the review application. The Tribunal is satisfied these include photographs showing the parties undertaking social

activity in the company of other people. The sponsor was able to contextualise a random selection of these photographs at hearing, identifying without difficulty who was in the photographs, when they were taken and where they were taken.

60. As to the basis on which the parties plan and undertake joint social activities, since their marriage in January 2018, the sponsor has travelled to Vietnam on 13 occasions in order to spend time with the applicant, during which occasions the Tribunal accepts the claim that they also spend time together with members of their respective families who reside in Vietnam.

61. *Assessment of the social aspects of the parties' relationship*

62. In this matter, the Tribunal has placed weight on witness declarations regarding the genuine nature of the parties relationship and in conjunction with evidence of their activities as a couple with other people during the sponsor's trips to Vietnam since the marriage considers the social aspects of the parties relationship give support to the claim that the parties are in a genuine and continuing spousal relationship.

63. **The nature of the persons' commitment to each other**

64. The Tribunal has considered the nature of the persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

65. *The duration of the relationship*

66. The parties married in January 2018, providing a relationship duration of over six and a half years. The Tribunal has placed weight upon this factor.

67. *The length of time during which the persons have lived together*

68. With the exception of the periods in which the parties have been together when the sponsor has visited Vietnam since their marriage in 2018, the parties have not had the opportunity to establish a shared household and live together. The Tribunal is however satisfied that the parties have spent time together during the sponsor's 13 trips to Vietnam since the marriage and therefore has given some weight to this factor.

69. *The degree of companionship and emotional support that the persons draw from each other*

70. The parties claim to communicate regularly and were able to give information about each other's current circumstances in their respective countries. They have provided extensive evidence of electronic communication with each other since the marriage. The Tribunal found the parties' discussion of their feelings for each other and their life aspirations at this mature stage of their lives to be both plausible and reasonable. The Tribunal considers their contention to have compatible personalities to be consistent with their presentation at hearing.

71. *Whether the persons see the relationship as a long term one*

72. The parties gave consistent evidence, which the Tribunal found credible, that they wish to be united in Australia and that they see their relationship as long term.

73. *Assessment of the companionship aspects of the relationship*

74. The Tribunal has given positive weight to the duration of the relationship, that the applicant and sponsor both see the relationship as long term and have congruent life goals for this stage of their lives, and to the degree of emotional support and companionship evident in their relationship. The Tribunal is satisfied that the applicant and sponsor present as two people in a supportive couple relationship. The Tribunal has placed weight on the commitment aspect of the parties' relationship.

75. *Overall assessment of the spousal relationship*

76. In this matter the Tribunal has placed weight on the evidence provided at hearing by the applicant and sponsor. The Tribunal considers this evidence plausible and reasonable. The Tribunal has placed considerable weight on the duration of the parties' relationship, which can be appropriately regarded as long term.

77. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and his sponsor are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others, and that they live together, or not separately and apart, on a permanent basis.

78. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.

79. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. At the time of the application, the applicant was sponsored by the sponsoring partner who had turned 18 years of age. She continues to be sponsored by her sponsoring partner.

80. Therefore, the applicant meets cl.309.211 and cl.309.221.

81. **The second named visa applicant**

82. As the second named visa applicant applied on the basis of being a member of the applicant's family unit, their application will be determined by reference to the outcome of the applicant's visa application on remittal to the Department for reconsideration.

83. Given the findings above, the appropriate course is to set aside the decisions under review and remit the applications for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

84. The Tribunal sets aside the decisions under review and remits the applications for a Partner (Provisional) (Class UF) visa for reconsideration, in accordance with the order that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl 309.211 of Schedule 2 to the Regulations
- cl 309.221 of Schedule 2 to the Regulations

Date(s) of hearing: 24 October 2024

Representative for the Applicant: Ms Jennifer Nguyen (MARN: 2117717)